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No. 88-1348

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1988

LEONA M. HELMSLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether an order denying a motion to dismiss an indictment for an alleged violation of petitioner's Fifth Amendment rights, and for a pretrial hearing regarding the merits of that Fifth Amendment claim, may be immediately appealed, prior to the entry of a final judgment of conviction and sentence, under the collateral order doctrine.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 864 F.2d 266.

JURISDICTION

The opinion of the court of appeals dismissing petitioner's appeal was entered on December 29, 1988. The petition for a writ of certiorari was filed on February 13, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Leona M. Helmsley is the president of Helmsley Hotels, Inc., a wholly owned subsidiary of Helmsley Enterprises, Inc. On April 14, 1988, a federal grand jury in the Southern District of New York returned

a 47-count indictment against petitioner, together with co-defendants Harry B. Helmsley, Joseph V. Licari, and Frank J. Turco. The indictment charged the defendants with conspiracy to commit offenses against the United States and to defraud the United States and the Internal Revenue Service, in violation of 18 U.S.C. 371; willfully attempting to evade and defeat taxes, in violation of 26 U.S.C. 7201; aiding and abetting petitioner in her attempts to evade personal income taxes, in violation of 26 U.S.C. 7201; willfully making and subscribing false individual tax returns (Forms 1040), in violation of 26 U.S.C. 7206(1); willfully aiding and assisting in the preparation and pre .itation of false individual, corporate, and partnership tax returns, in violation of 26 U.S.C. 7206(2); mail fraud, in violation of 18 U.S.C. 1341; and extortion, in violation of 18 U.S.C. 1951. See Pet. App. 3a.

On June 17, 1988, petitioner moved to dismiss the indictment and for a hearing, pursuant to *Kastigar* v. *United States*, 406 U.S. 441 (1972). She claimed that the grand jury that indicted her had made use of certain immunized testimony that she had previously given before a New York State grand jury. On August 30, 1988, the district court denied petitioner's motion (2 C.A. App. 236-240). The court rejected the "bald assertion" (*id.* at 238) that the federal grand jury had been influenced by newspaper reports concerning petitioner's state grand jury testimony. The court explained that there is a "presumption of regularity in * * * grand jury proceedings" (*ibid.*), and that in this case the federal prosecutor had "repeatedly warned" the grand jurors "to ignore any information which came to their attention outside of the gran i jury room" (*id.* at 239). The court found that the record reflected nothing more than "some isolated newspaper articles

that it is baldly asserted may possibly have been read by grand jurors" (*ibid.*). Finally, the court denied petitioner's request for a pretrial hearing concerning the possible misuse of her immunized testimony. "Such a hearing," the court explained (*id.* at 239-240), "is more appropriately held after the completion of the trial and a guilty verdict, if there is such a verdict. Of course, if the defendant is acquitted, no hearing will be necessary. If found guilty, the defendant may renew her request for a *Kastigar* hearing, and the trial record will enable the Court to better determine whether the defendant's Fifth Amendment rights have been infringed."

2. The court of appeals dismissed petitioner's appeal for want of appellate jurisdiction (Pet. App. 1a-11a). The court explained that the order appealed from failed to meet two of the three requirements of the collateral order doctrine, as articulated in *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949). First, the court stated, the order did not " 'conclusively determine the disputed question' " because the district court had rejected petitioner's motion without prejudice and might yet "rule in her favor after a trial" (Pet. App. 8a (citation omitted)). Second, the court held, the district court's order was not " 'effectively unreviewable on appeal from a final judgment' " because petitioner "may raise her allegations of grand jury abuse of process after trial" (*id.* at 8a-9a (citation omitted)). Finally, the court of appeals saw no "reason to lower the legal bar of the finality rule by creating an additional exception to the collateral order doctrine in this case" (*id.* at 10a). "Were [petitioner's] proposed exception adopted," the court concluded (*ibid.*), "it would swallow the rule."[1]

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[1] Judge Van Graafeiland concurred (Pet. App. 11a). He stated that if the district court's order were appealable, he would hold "on the merits that the decision was made for good cause, since the district court felt that 'the trial record would enable the Court to better deter-

ARGUMENT

Under this Court's decisions—reaffirmed, most recently, in *Midland Asphalt Corp.* v. *United States*, No. 87-1905 (Mar. 28, 1989)—the district court's order in this case was not subject to interlocutory appeal. The court of appeals' decision is therefore correct and does not conflict with any decisions of this Court or of any other court of appeals. Further review is unwarranted.[2]

a. Under 28 U.S.C. 1291, the courts of appeals have jurisdiction over appeals "from all final decisions of the district courts * * * except where a direct review may be had in the Supreme Court." In the context of criminal prosecutions, Section 1291 prohibits appellate review until after conviction and the imposition of sentence. See *Berman* v. *United States*, 302 U.S. 211, 212 (1937). "Since petitioner[] ha[s] not yet even been tried, much less convicted or sentenced, it is plain that the District Court's order denying [her] motion * * * falls within this prohibition." *Midland Asphalt*, slip op. 4.

In *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949), however, the Court articulated a narrow exception to the final judgment rule for a "small class" of orders that

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mine whether the [petitioner's] Fifth Amendment rights were infringed' " (*ibid.* (citation omitted)).

[2] This is the second such interlocutory appeal taken by petitioner from an order in this case. On June 17, 1988, petitioner, together with her co-defendant Harry B. Helmsley, moved to dismiss the indictment on the ground that the government had violated Fed. R. Crim. P. 6(e) by publicly disclosing details of the grand jury investigation. On July 19, 1988, following a hearing, the district court denied petitioner's motion, and the court of appeals dismissed petitioner's appeal for want of jurisdiction. On April 3, 1989, this Court denied a petition for a writ of certiorari seeking review of the court of appeals' decision. *Helmsley* v. *United States*, No. 88-732.

"finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated" (*id.* at 546). As the Court has since explained, to qualify as an appealable collateral order under *Cohen*, a district court order must (1) "conclusively determine the disputed question," (2) "resolve an important issue completely separate from the merits of the action," and (3) "be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 (1978). In criminal cases, moreover, the Court has "interpreted the requirements of the collateral-order exception to the final judgment rule with the utmost strictness" (*Flanagan* v. *United States*, 465 U.S. 259, 265 (1984)). Indeed, in the 40 years since the *Cohen* case was decided, while the Court "frequently has considered the appealability of pretrial orders in criminal cases" (*United States* v. *MacDonald*, 435 U.S. 850, 853 (1978)), it "has found only three types of pretrial orders * * * to meet the requirements" (*Flanagan*, 465 U.S. at 265-266)—orders denying a motion to reduce bail (*Stack* v. *Boyle*, 342 U.S. 1 (1951)); orders denying a motion to dismiss an indictment on double jeopardy grounds (*Abney* v. *United States*, 431 U.S. 651 (1977)); and orders denying a motion to dismiss an indictment under the Speech or Debate Clause, Art. I, § 6 (*Helstoski* v. *Meanor*, 442 U.S. 500 (1979)).

b. The court of appeals faithfully applied those principles in dismissing petitioner's appeal for want of jurisdiction. For two independent reasons, the district court's order is not subject to interlocutory review.

First, as the court of appeals noted (Pet. App. 8a), the order did not "conclusively determine the disputed ques-

tion" (*Coopers & Lybrand,* 437 U.S. at 468). Rather, the district court denied petitioner's motion without prejudice and reserved the right to hold a hearing and reconsider the matter after trial.[3] Accordingly, the order "is subject to revision in the District Court" (*id.* at 469), and is too "tentative, informal or incomplete" to qualify for immediate review (*Cohen*, 337 U.S. at 546).

Second, the district court's order is not "effectively unreviewable on appeal from a final judgment" (*Coopers & Lybrand,* 437 U.S. at 468). Petitioner contends otherwise, asserting (Pet. 7-11) that she has a "right not to stand trial" in this case (Pet. 9) if, as she claims, "the *entire prosecution* commenced as a result of public disclosure of immunized grand jury testimony" (Pet. 10 (emphasis in the original)). "One must be careful, however, not to play word games with the concept of a 'right not to be tried.' " *Midland Asphalt*, slip op. 7. As the Court has recently explained, "any legal rule can be said to give rise to a 'right not to be tried' if failure to observe it requires the trial court to dismiss the indictment or terminate the trial. But that is assuredly not the sense relevant for purposes of the exception to the final judgment rule." *Ibid.* Instead, "[a] right not to be tried in the sense relevant to the *Cohen* exception rests upon an explicit statutory or constitutional guarantee that trial will not occur" (*id.* at 8). In the present case, nothing in the Self-Incrimination Clause of the Fifth Amendment—on which petitioner relies (Pet. 8-11)—affords petitioner a right not to be tried, even if her allegations of misuse of immunized testimony were true. See

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[3] As petitioner acknowledges (Pet. 7-8), the courts of appeals have uniformly held that a *Kastigar* hearing may be deferred until the trial has concluded. See, *e.g., United States* v. *Tantalo*, 680 F.2d 903, 909 (2d Cir. 1982); *United States* v. *Frumento*, 552 F.2d 534, 542 n.14 (3d Cir. 1977); *United States* v. *De Diego*, 511 F.2d 818, 823-824 (D.C. Cir. 1975).

Lawn v. *United States*, 355 U.S. 339, 349 (1958). See also *Midland Asphalt*, slip op. 8-9.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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